SIM SIOK ENG v. GOVERNMENT OF MALAYSIA

[F.C. (Lee Hun Hoe C.J. (Borneo), Raja Azlan Shah and Wan Suleiman F.JJ.)
November 29, 1976 and July 14, 1977]

[Kuching — Federal Court Civil Appeal Nos. 69 and 73 of 1976]

Contract — Building contract — Failure to complete building on completion date — Arrangement by the owner to supply building materials to building contractor — Stoppage of supply — No reasonable notice given to building contractor — Equitable doctrine of forbearance — Whether applicable.

The appellant appealed against the decision of the High Court which had given judgment against him on two suits for breach of contract. The appellant had undertaken to build some buildings for the respondent but did not complete on the completion date. There had been an arrangement for the respondent to supply certain building materials to the appellant, as he had found difficulty in getting them. Subsequently the supply was stopped but no adequate notice was given to the appellant.

Held: (1) in this case the appellant was clearly induced to believe that certain essential materials would be supplied to him. The respondent promised to supply the materials to appellant whenever the latter asked for them and a considerable amount of materials were so supplied. Relying on the promise or assurance the appellant had altered his position and his responsibilities to supply those materials had been suspended or kept in abeyance. For the respondent to reimpose the contractual provision adequate notice should be given;

(2) as the learned judge himself had held that the notice given was not reasonable, it should have been held that the respondent was in breach in terminating the contract and judgment given in favour of the appellant.

Cases referred to:-

(1) *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439, p. 448.
(2) *Birmingham District Land Company* v. *London and North Western Railway Company* (1889), 40 Ch. D. 268.
(3) *Salisbury (Marquess) & Anor.* v. *Gilmore & Anor.* [1942] 2 K.B. 38; [1942] 1 All E.R. 457.
(4) *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.* [1955] 2 All E.R. 657, 660.
(5) *Emmanuel Ayodeji Ajayi* v. *R.T. Briscoe (Nigeria) Limited* [1964] 1 W.L.R. 1326, 1330.
(6) *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 2 K.B. 473, 477.
(7) *Combe* v. *Combe* [1951] 1 All E.R. 767, 770 and 773.
(8) *Mertens* v. *Home Freeholds Co. Ltd. & Ors.* [1921] All E.R. Rep. 372.
(9) *Stead* v. *Dawber* 113 E.R. 22.
(10) *Jorden* v. *Money* (1854) 5 H.L.C. 185; 10 E.R. 868.
(11) *Charles Rickards* v. *Oppenhaim* [1950] 1 K.B. 616.
(12) *Leather Cloth Co.* v. *Hieronimus* (1875) L.R. 10 Q.B. 140.

FEDERAL COURT.

Joseph Grimberg (*C.E. Lee* with him) for the appellant.

Saari bin Yusuf (Federal Counsel) for the respondent.

Lee Hun Hoe C.J. (Borneo): These appeals arise consequent upon the decision of the learned judge in respect of a consolidated action of two civil suits, namely, C.S. No. 25/72 ("the first suit") and C.S. No. 71/72 ("the second suit"). Both suits are concerned with breaches of contract. Sim Siok Eng has appealed against the decision of the learned judge in respect of both suits and the Government of Malaysia has cross-appealed against the decision in "the first suit." For convenience, Sim Siok Eng will be referred to as the appellant and the Government of Malaysia as respondent.

Appellant was a well-known local contractor and had tendered and completed successfully about twenty major projects to the satisfaction of the Government. In January 1969 Government called for tenders for the construction of the Sibu Infantry Battalion Complex which covered nearly 200 acres of land at 14 Mile Oya Road, Sibu, Sarawak. Fourteen contractors bid for the contract. Sim's tender for $3,930,000 was accepted. The contract was signed on March 6, 1969 and was to be completed within eighteen months. After signing the contract appellant discovered that his office had made a serious error of calculation involving $1,300,000. Instead of four units to one block his office calculated the tender on the basis of two units to one block. In other words, instead of 320 units his office calculated 160 units. Despite this appellant did not ask to be released from the contract. He felt that it would still be possible to make a small profit. He was more concerned with preserving his reputation as a good contractor. During the course of the contract two extensions totalling slightly more than four months were granted for the completion of the contract. Due to these extensions the contract sum was, therefore, raised to $4,002,532.54. The extensions took the completion date to December 28, 1970. Under clause 4 of the Conditions of Contract appellant was obliged to supply materials and labour.

To finance the contract Sim managed to get the Hock Hua Bank to grant him clear overdraft facilities up to $300,000 and Letters of Credit amounting to $800,000. In 1970 he found difficulty in obtaining building materials to complete the work so he saw the Director of Public Works Department, Sarawak. A meeting was called on October 9, 1970. Those present were the Director of Public Works Department (Ng Siak Kee), the Assistant Director of Armed Forces Works (Law Kiat Howe), the Divisional Engineer (Michael Parker) and the appellant. As a result the respondent orally agreed to supply the appellant with certain building materials the cost thereof to be deducted from the payment due to the appellant. From then on whenever the appellant wanted such building materials he would just write to the Divisional Engineer. One of the materials was waterproof plywood for which an order was placed for 25,000 pieces. The first shipment of 400 pieces and second shipment of 7,000 pieces reached the site. About 3,400 pieces were used. Then the Anti Corruption Agency seized the plywood and locked them in the store and asked appellant not to use them. Later, the Anti Corruption Agency took them away. The Director of Public Works also wrote to appellant advising him not to use them. No reason was given. By December 1970 a large percentage of the external part of the project had been completed. Without plywood it was not possible for appellant to instal internal partitioning.

Twenty-three progress payments totalling $3,091,497.75 were made. The last progress payment made on November 2, 1971 was based on assessment

made by respondent's representative dated October 22, 1970. No building materials were supplied after seizure of plywood by the Anti Corruption Agency. Consequently, appellant stopped work on April 4, 1971. After he stopped work his contract was terminated, purportedly under clause 34(a)(ii) on April 28, 1971. The Government called for another tender and contractor Alex Tong completed the work.

There were two main issues which the learned judge had to deal with. First, whether the Government was in breach of contract. Secondly, whether the Government was justified under the circumstances to determine the contract on the ground that appellant had failed to proceed with due diligence in performing his contract under clause 34(a)(ii) which reads: —

"34(a) Default — If the Contractor shall make default in any of the following respects, namely:

....

(ii) fails to proceed with the works with reasonable diligence

....

then, if any such default shall continue for seven days after a notice sent by registered post to the Contractor from the Superintending Officer specifying the same, the Superintending Officer may (without prejudice to any other rights herein contained) thereupon by notice sent by registered post determine this Contract; provided that notice hereunder shall not be given unreasonably or vexatiously and such notice shall be void if Government is at the time of the notice in breach of this Contract."

In the light of the evidence the learned judge expressed the view that appellant's case turned upon the answer to one question relating to the October meeting at the office of the Director of Public Works, Kuching: Did the parties come to an agreement whereby the respondent agreed to supply certain essential building materials to appellant and thereby agreeing to vary an important term of the contract regarding the supply of these materials?

Appellant relied on the agreement made on October 9, 1970 whereby respondent had agreed to supply essential building materials to the appellant. By virtue of this agreement appellant submitted that respondent had agreed to vary an important clause, that is, clause 4 of the contract regarding the supply of these materials. On the other hand, respondent contended no agreement had been made but that Government merely decided to grant appellant a concession in order to assist appellant temporarily.

The Director of Public Works stated that the concession was subject to two conditions, namely, (1) that appellant must have genuine difficulty in obtaining the supply of cement, plywood and hardwood timber, and (2) that appellant must maintain a work force of 150 men on site at all times. Appellant maintained that there was no such conditions attached to the agreement. Indeed, if there was no agreement why attach conditions. In any case, the day after the meeting the Director of Public Works sent an official memorandum to the Divisional Engineer in these terms: —

"Reference is made to the discussion held in Director of Public Works' office on October 9, 1970 between Director of Public Works/Divisional Engineer, 3rd Division/Assistant Director (Armed Forces Works & Training).

2. Since the contractor fails to supply the timber and other essential building materials in sufficient time to enable this urgent military project to be completed by the completion date, provisions in Items C and D in pages S5 of the contract specification can be applied with immediate effect.

3. You are, however, requested to exert strict checking and control of the building materials so supplied by Public Works Department and to ensure that they are actually delivered to site and incorporated in the construction and completion of the project. Proper records are to be kept and receipts signed by the contractor should be obtained whenever materials are delivered by P.W.D. trucks to site. The cost of the materials supplied is to be deducted from the monthly progressive payment.

4. As a precautionary measure a barrier-gate should be erected and watchmen on 24 hours' duty be provided so that no materials, which are already paid for, leave the site without the knowledge of the Resident Engineer.

5. The above arrangement is intended to expedite the progress of this urgent and important military project with the hope that the whole work will be completed by January 1971. Your close liaison with the contractor will be much appreciated.

6. As discussed you may proceed with the tender for the annual supply of hardboard and plywood on an 'as and when required basis'. These materials, if required, can be supplied to the contractor under the same provision of Items C and D of the specification."

Items C and D of the Specification (See Agreed Bundle "A" at page 21) provide that: —

"C. If the contractor fails for any reason to supply any materials which he has contracted to supply or if he fails to supply any such materials in sufficient time to enable the contract to be completed by the agreed date for completion, then in either event Government may supply any portion, or all, of such materials. If Government supplies such materials the cost in respect thereof to be borne by the contractor shall be EITHER the current market rate OR the actual cost to Government at the date of supply, including overhead and any other charges, WHICHEVER IS THE GREATER.

D. The cost to be borne by the contractor as above detailed, shall be deducted from money due or to become due to the contractor under this contract and the contract sum shall be adjusted accordingly. Provided that any variation order issued by virtue of this clause shall not be taken into account when computing the final amount of this contract on which the Retention Fund is based and no claim for loss of profit under clause 12 of the conditions of contract shall be deemed to have arisen. No action by the Superintending Officer under this clause shall be deemed in any way to affect or modify the right of Government to a claim for damages in the event of the contractor's failure to complete the works by the agreed date for completion."

The learned judge quite rightly rejected the contention of the Director of Public Works that appellant agreed to the two conditions. He pointed out that none of the other people present at the meeting mentioned about the two conditions. Neither was there anything mentioned about the conditions in his official memorandum to the Divisional Engineer. However, the learned judge held that the October meeting merely resulted in a temporary arrangement to assist appellant in obtaining certain essential building materials. Under clause 4 of the contract appellant was bound to supply these materials in addition to labour. The learned judge was of the view that the concession did not have the effect of varying or modifying clause 4 of the contract which provides, *inter alia*, that the contractor "shall provide everything necessary for the proper execution of the works according to the true intent and meaning of the Drawings and Specification taken together."

The learned judge further held that the Director of Public Works had power under clause 6(c) to make temporary arrangement with the appellant for the supply of the materials. Clause 6(c) and (d) of the Basic Specification for Building Works (See Agreed Bundle "A" at page 37) reads: —

"6(c) If the contractor's failure to supply any material causes any interruption or delay in the progress of the work, Government may supply any portion or all of the materials and the cost borne by the contractor shall be either as calculated at the current market rates or the actual cost to the Government at the date of supply, including overhead or any other charges, whichever is the greater.

(d) Any costs incurred under paragraphs (a) and (c), shall be deducted from the contract sum by means of a Variation Order, but in the case of paragraph (c) only such Variation Order shall not be taken into account in computing the final sum on which the Retention Fund is based and no claim for loss of profit under the Conditions of this contract shall be deemed to have arisen. No action taken under these clauses shall in any way affect or modify the right of Government to claim for damages in the event of the contractor's failure to complete the works by the agreed date."

The learned judge quite properly pointed out that only at the trial the Director of Public Works relied on above clause 6(c). The learned judge rejected the contention of the appellant that the October meeting resulted in a variation of clause 4 of the contract. It should be pointed out that for clause 6(c) to be invoked there must have been a failure to supply materials on the part of appellant. The October meeting was arranged because appellant had difficulty in obtaining building materials. This could not be taken to mean failure to supply materials.

The Anti Corruption Agency seized the plywood on January 6, 1971. The Divisional Engineer sent a letter dated January 19, 1971 to appellant advising appellant not to make use of the plywood supplied by Borneo Enterprise Co. until further notice was given to him. However, no notice, whether oral or written, seems to have been given to appellant up to the time when his contract was terminated on April 28, 1971. It is interesting to note that the Director of Public Works wrote to appellant on February 27, 1971 that "the action taken by the Anti-Corruption Agency on January 6, 1971 in which the plywood supplied was compounded is beyond the control of this Department." It is also fair to say that it was also beyond the control of the appellant. Despite repeated demands Government took no step to supply him with any more plywood. Then on March 30, 1971 the Director of Public Works wrote to appellant and I refer to the relevant portion of his letter which reads:—

"Since you have experienced difficulty in getting building materials for this project, this Department has been in the past supplying you with some of the building materials for which you have difficulties in obtaining under clause 6(c) of the Basic Specifications for Building Works Section in the hope that you would complete this urgent and vital military project as soon as possible. It must be emphasized that this Department is not obliged under all circumstances to supply any materials to the contractor under the terms of the contract and that it is only at the discretion of the Divisional Engineer whether or not to supply any materials to the contractor in strict accordance with the conditions of contract. It is considered no longer appropriate for this Department to continue to supply you with building materials and you are requested, without undue delay, to provide all labour and materials necessary for the completion of the works in accordance with the terms of contract."

The Director of Public Works Department, Peninsular Malaysia sent the appellant a letter dated April 8, 1971 (Bundle "B" page 130) by registered post which reached him on April 14, 1971. The letter states as follows: —

"I refer to numerous warning letters which have been sent to you under registered cover by Director of Public Works, Sarawak to the effect that you have failed to proceed with the above works with reasonable diligence. It is now reported that you have failed to show any substantial improvement in the process of works. I hereby give you Notice of Default in accordance with clause 34(a) of the Conditions of Contract.

2. If the default continues for 14 days after receipt of this notice, the above mentioned contract will be determined and works will be completed under Clause 34(c) of the Conditions of Contract.

3. Would you please show cause and reason as to why this course of action should not be taken by the Government.

4. Would you please acknowledge receipt of this notice and forward your reply to this office with a copy extended to D.P.W. Sarawak within 14 days of receipt of this letter."

Appellant replied on April 15, 1971 (Bundle "B" page 132) as follows: —

"We refer to you letter dated April 8, 1971. Our letter dated April 10, 1971, to you applies. As the Government, in our view, is in breach of the Contract, there is no question of the Government taking over the Contract."

The reference to letter dated April 10, 1971 (Bundle "B" page 131) was one he wrote earlier to Director of Public Works Sarawak. This letter reads as follows: —

"We thank you for your letters dated March 30, 1971, and April 3, 1971. My letter dated April 4, 1971, to the Divisional Engineer, Sibu, with copy to you, applies. We must stress that, though the Government was not obliged to supply us the materials, *we acted in good faith on your promises that the same would be supplied to us.*"

The letter dated April 4, 1971 (Bundle "B" page 127 to the Divisional Engineer reads as follows: —

"We regret that, owing to the circumstances set down below, works at the works site have been forced to come to a standstill on April 5, 1971.

Unless and until your Department would fulfil your promise in supplying the materials concerned, we can hardly undertake to expedite the progress of the above project.

(1) There has been no response to our orders for the supply of plywood and hardwood doors (our letter dated 8/12/70 and yours dated 4/12/70).

(2) There has been no replacement for the plywood which were ordinarily supplied by your Department and which we have been instructed were not to be used (your letter dated January 19, 1971).

(3) The quantity of H.W. timber had not been supplied as requested (a balance of about 310 tons has yet to be delivered to us). And we had been informed by your Mr. Kueh Liew Mei last week that no further supply would be given to us.

(4) Levelling and trimming of earth for the construction of footpath have not been carried out by Department (our letter dated March 14, 1971), thus causing the delay for the said construction.

(5) Your Department must be aware that a project of the present size requires considerable organisation and co-ordination of the force. Our failure to receive the materials concerned in time has contributed greatly to the present regrettable position.

Your Mr. Kueh Liew Mei last week at the work site canteen told our workers that your Department had taken over the project. As a result of this, our workers have refused to work for me.

We shall be most thankful if your Department will be more considerate and co-operate with us so that more progress can be made and the work will be completed soonest. On our part, we are both willing and able to fulfil all the obligations under the contract."

To this letter the Divisional Engineer replied on April 6, 1971 (Bundle "B" page 129) in the following terms: —

2. With reference to items 1, 2, 3 and 5 of paragraph 2 of your letter quoted above, I wish to bring to your attention that the supply of building materials to your organisation was made on your own request as you experienced difficulty in obtaining them. The department is under no obligation whatsoever to supply the building materials to your organisation under the terms of the contract but we have done so at your request and with the aim of expediting the progress on this project which has fallen behind schedule due to lack of building materials and poor organisation.

3. On the issue of levelling and trimming of earth for the construction of the footpaths, I wish to advise that it is your own excavated material that is standing in the way.

4. The allegation contained in your paragraph 3 is not at all true as your workers have refused to work for you for reasons which you know best yourselves.

5. Your labour force since the beginning of this month is about 30 and very little progress can be seen. You have been warned of the consequences and I trust that your organisation will be improved."

Finally, the Director of Public Works, Peninsular Malaysia wrote to appellant on April 28, 1971 (Bundle "B" page 134) as follows: —

"The default specified in my letter Ref: PKR (AB) 241/6(39) dated April 8, 1971 has continued for seven days after the despatch of that letter. This is to inform you that I hereby determine your employment under this Contract in accordance with Clause 34(a) of the Conditions of Contract."

The learned judge quite rightly pointed out that the notice dated April 8, 1971 referred to numerous registered letters sent to appellant when in fact only two such letters were sent to appellant. He agreed that there were a number of complaints by the former Resident Engineer, Mr. Srinivasam, but expressed the view that the acts or omissions of appellant were not serious enough in the aggregate to give rise to the exercise of clause 34(a) of the Conditions of Contract by respondent or representative. I agree with his conclusion that in considering whether or not appellant had failed to proceed with reasonable diligence the period prior to February 9, 1971 should be disregarded.

Under clause 4 appellant was to supply plywood flush doors. However, following the October meeting the Resident Engineer, wrote to appellant on December 4, 1970 informing him that: —

"By strength of condition No. 33 of the Conditions of Contract, this office is prepared to assist you by calling Tender to have these doors supplied to you by other local manufacturers and deduct the cost from moneys become due to you. In this connection I have to request you to advise this office of the amount of your requirement without any further delay."

A copy of the letter was also sent to the Divisional Engineer. The appellant on December 8, 1970 wrote to the Resident Engineer placing an order for 1783 plywood flush doors. Neither were the doors supplied nor was there any courtesy to inform appellant that his order could not be entertained. As the learned judge said at page 326 of the Appeal Record that: —

"... It was plain that the plaintiff was kept in the dark and in suspense about the non-supply of plywood flush doors from December 8, 1970 until March 30, 1971 when on the latter date, the Director of PWD made it abundantly clear to the plaintiff that 'it is considered no longer appropriate for this Department to continue to supply you with building materials and you are requested, without undue delay, to provide all labour and materials necessary for the completion of the works in accordance with the terms of the contract."

The contention of the Government was that the Resident Engineer had no authority to make such offer to appellant. When appellant ordered the plywood he did so through the Divisional Engineer who, it must be assumed, was the representative of the Director of Public Works.

Appellant's understanding was that following the October meeting he was relieved from supplying the materials and the contract was varied. The important thing is that he relied on the promise or assurance given by respondent and altered his position accordingly. It should be mentioned that it was not in dispute that after the October meeting the orders of appellant for cement and hardwood were met. Regarding the plywood the learned judge pointed out that after the seizure by the Anti-Corruption Agency on January 6, 1971 no more supply of plywood was made by respondent. Curiously enough, appellant continued to receive supply of hardwood timber after January 6, 1971. The last delivery of hardwood timber was made on April 7, 1971 (See Bundle "K" at page 48).

The learned judge considered the failure by respondent to supply plywood and plywood flush doors to appellant in proper time or at all did not amount to a breach of contract as there never existed any legally binding agreement for supply of these materials. Apparently, the learned judge felt that there was agreement of some sort for he went on to say that the first indication to appellant that respondent "was going to resile from the temporary arrangement was contained in a letter sent by the Director of Public Works on March 30, 1971." This letter was referred to earlier on.

Before us appellant conceded that work was not completed on completion date. But, it was contended that the termination was unreasonable because the failure was due to certain omissions on the part of respondent. First, respondent failed to supply materials to appellant in accordance with an oral variation of the contract which occurred at a meeting attended by appellant and respondent's representatives in October 1970. At the meeting respondent agreed that they would secure and pay for specific materials which were required for purposes of work, particularly plywood. The cost of the materials would be deducted from payment due to appellant on the contract. Secondly, respondent failed to comply with a written variation of the contract which took place in December 1970 by exchange of correspondence pursuant to which respondent agreed to supply flush doors. Thirdly, respondent failed to make progress payment beyond the 23rd progress payment thus deny-

ing appellant the necessary fund that appellant needed to proceed with the works expeditiously.

One of the main difficulties appellant was experiencing at the time was finance to complete the project because he had undertendered due to miscalculation of the number of units. Nonetheless, substantial part of the contract had been completed. It was contended that if plywood and flush doors were supplied fragile and other items could have been installed then he would have been entitled to substantial progress payment. The failure on the part of respondent to supply him with these materials prevented him from completing the internal works. Thus, he was denied substantial fund. The result was that his work force dwindled to the point that there was only a handful of workmen on the site when the contract was eventually terminated. It was submitted under the circumstances the termination of the contract was wrongful as the contract was varied so as to place the obligation on respondent to supply certain essential materials. Alternatively, if, as the learned judge had found that the arrangement was only temporary, then it was incumbent on respondent to give appellant adequate notice of termination of the temporary arrangement. This was not done. Therefore, it was not possible for appellant to revert to his original contractual position since the failure to supply him with essential materials had starved him of a substantial sum of money. Thus, it would be beyond his power to revert to the original term of contract and to supply his own materials.

Appellant said that there was lack of good faith on respondent's part regarding progress payment. After the 23rd progress payment no further payment was made. The last assessment was made on November 2, 1970. All previous assessments were made by the Resident Engineer. Moreover two months after the last assessment respondent put in a team of people entirely new on the job to reassess the work. The progress payments were based on estimated value of work done. It would be odd for a subsequent assessment of work to be lower than a previous one as the same standard chart was used for valuation. The first assessment in November 1970 was average 77% but the new assessment in January 1971 showed the average to be 64% (See Bundle "C" page 19-25). As the Divisional Engineer remarked (page 185 of Appeal Record) that: —

"In my career, I have not come across a case where a succeeding assessment was lower than the previous one."

Appellant contended but without justification that the subsequent assessment was an attempt to justify respondent's failure to make progress payment after the 23rd progress payment. The learned judge could not understand why the November assessment should be lower than the January assessment since appellant had incorporated about 3,400 plywood into the building between December 1970 and early January 1971.

Regarding progress payment respondent pointed out that even if appellant was entitled to such payment the amount would be very small. However, it was submitted that appellant was not entitled to such payment. There were certain sums which were not payable as progress payment, viz. (a) retention money (this could not be paid until six months after the completion of contract); (b) if materials were supplied the PWD must deduct costs of materials; and (c) apart from retention money there was the final payment which could not be made before completion of contract.

Respondent questioned the means of appellant to complete the contract within a reasonable period. Numerous letters were sent to appellant reminding him of his obligation under the contract. Even if materials were supplied to appellant it was doubtful that he would be able to complete the contract within reasonable period. This is strange since respondent was prepared to supply the materials. The implication is that if respondent was willing to give such promise or assurance respondent must be satisfied that appellant was able to complete the contract within reasonable time.

The flush doors and progress payments had been canvassed in some detail before the learned judge. For myself, I do not think there is merit in either ground. The main ground is the reliance on equitable principle.

Appellant relied on the equitable principle stated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.*[1] at page 448 in these words: —

"... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

In *Hughes' case*[1] the landlord gave his tenant in October 1874 six months' notice to repair the premises. If the tenant failed to comply with it, the lease could be forfeited. In November the landlord started negotiations with the tenant for the sale of the reversion but these were broken off in December 31. Meanwhile, the tenant had done nothing to repair the premises. On the expiry of six months from the date of the original notice, the landlord claimed to treat the lease as forfeited and brought an action for ejectment. The House of Lords held that the opening of negotiations amounted to a promise by the landlord that, as long as they continued, he would not enforce the notice, and it was in reliance upon this promise that the tenant had remained quiescent. The six months allowed for repairs were to run, therefore, only from the failure of the negotiations and consequent withdrawal of the promise, and the tenant was entitled in equity to be relieved against forfeiture.

That case was followed and applied in *Birmingham and District Land Company* v. *London and North Western Railway Company*[2] and *Salisbury (Marquess) & Anor.* v. *Gilmore & Anor.*[3] Talking about the *ratio decidendi* expressed by Lord Cairns in *Hughes' case*[1] Bowen L.J. in *Birmingham's case*[2] elaborated on the principle and stated that: —

"... if persons who have contractual rights against others induce by their conduct those against whom they have such

rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before."

It was argued that the principle applied to the present case. Here the appellant was clearly induced to believe that certain essential materials would be supplied to him. Respondent promised to supply the materials to appellant whenever the latter asked for them. Indeed, a considerable amount of materials were so supplied. Relying on the promise or assurance given appellant had altered his position. His responsibilities to supply those materials had been suspended or kept in abeyance. For respondent to re-impose the contractual provision adequate notice should be given. This principle has been applied again and again in numerous cases.

It was said that the equitable estoppel was not expressly pleaded so the learned judge had not dealt with the point. At the trial the question of adequate or reasonable notice was argued. Also, arguments were centred on the question of variation of contract. On the pleading and the evidence before the court there is certainly no reason to exclude appellant from relying on a statement of principle. The equitable principle enunciated by Lord Cairns in *Hughes's case*[1] appears to be akin to the doctrine of estoppel and covers promises as well as statements of fact. It has been described as "promissory estoppel" in contrast to an estoppel founded upon a misrepresentation of fact. That principle was discussed in *Tool Metal Manufacturing Co. Ltd.* v. *Tungsten Electric Co. Ltd.*[4] which was cited and dealt with by the learned judge. It is fair to say that the argument before the learned judge was centred round the adequacy of notice and variation of contract. The equitable defence was put forward more effectively in this court.

In *Tool Metal's case*[4] Pearson J. held that an agreement operated in equity to suspend appellant's legal rights to compensation until reasonable notice to resume them had been given. He considered that their counterclaim amounted to such notice. The Court of Appeal thought otherwise and reversed Pearson J. The House of Lords disagreed with the Court of Appeal and restored the judgment of Pearson J.

One further case on the subject not mentioned in the lower courts may be referred to. In *Emmanuel Ayodeji Ajayi* v. *R.T. Briscoe (Nigeria) Limited*[5] the hire-purchaser of a number of lorries attempted to resist an action for recovery of outstanding instalments on ground that payment of these instalments had been suspended until certain conditions had been fulfilled. The Privy Council held that the defendant had not made good the equitable defence, for the evidence did support his allegation that he had altered his position and it could not be said that his lorries were not available to him after they were repaired. Lord Hodson in delivering the judgment of the Board after referring to *Birmingham's case*[2] and *Tool Metal's case*[4] stated that: —

"The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favour of the other party. This equity is, however, subject to the qualifications (1) that the other party has altered his position, (2) that the promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position, (3) the promise only becomes final and irrevocable if the promisee cannot resume his position."

In deciding whether or not the notice was reasonable and adequate the surrounding circumstances would have to be considered. The learned judge had done so. He had dealt with it in some detail and came to the conclusion (page 338 of the Appeal Record) that: —

"It was not until March 30, 1971 that the Director of PWD officially notified the plaintiff that the temporary arrangement arrived at following the October meeting was coming to an end and that henceforth, the plaintiff should be responsible for the supply of building materials in order to complete the works in accordance with the contract. *It seems to me that the defendant did not give the plaintiff any reasonable time to look for his own supply.*"

With that finding I respectfully agree with the learned judge, particularly the words italicized. Those words are important. I may mention that despite the letter of March 30, 1971 supply of materials continued to be made, particularly, the last supply of hardwood timber was made on April 7, 1971 more than a week after the notice. On the one hand notice was given that respondent was going to insist on their legal rights. While on the other hand respondent continued to supply appellant with materials. The rule that protects a party in such circumstances such as these, is a broad rule of equity and justice. Apart from the inconvenience to the party who thought he was temporarily relieved it would certainly not be right for a man, who has indicated that he is not going to insist on his strict legal rights, to be able to turn round at a moment's notice and insist upon his rights. If he wants to resume his strict rights then equity demands that he should give reasonable and adequate notice.

The learned judge took the view that the October meeting did not result in any legally binding agreement to vary the contract but only a temporary arrangement, whereby respondent would supply essential materials. Therefore, he held that the letters of appellant dated April 4, 10 and 15, 1971, did not constitute any valid defence to respondent's right to determine the contract under clause 34(a). Appellant did not question respondent's right to revert to the strict terms of the contract but contended before doing so reasonable and adequate notice must be given. By his use of the phrase "legally binding agreement" it would seem that the learned judge has in mind the absence of consideration. But, absence of consideration has never prevented the courts, as shown by the many cases cited, from doing justice to the case on equitable principle. The equitable principle enunciated in *Hughes' case*[1] and other related cases appears to lay down that a promise is binding (at least it may be set up as a defence) if deliberately made, intended to be binding and acted on, and in fact acted on. In making the promise or assurance respondent did state that appellant was obliged under the contract to supply the materials. The promise was clearly

to be binding and acted on as was indicated by the letter of Director of Public Works to the Divisional Engineer written soon after the October meeting. Essential materials were in fact supplied. Had it not been for the seizure of the plywood by the Anti-Corruption Agency respondent would no doubt fulfil the promise made. It seems to me wrong for one to a contract to give the other permission to commit a breach and then turn round and sue him for it. Such a party must be taken to have waived a condition of the contract. At least the other's obligations under the contract must be regarded as having been suspended until sufficient time has been given to enable him to assume his original obligation. In *Panoutsos* v. *Raymond Hadley Corporation of New York*[6] Viscount Reading C.J. said at page 477 that "It is open to a party to a contract to waive a condition which is inserted for his benefit." Respondent did give notice but as the learned judge said the notice did not give appellant reasonable time to look for his own supply.

In *Combe* v. *Combe*[7] Birkett L.J. stated at page 773 that the equitable principle was a "doctrine which would enable a person to use it as a shield and not as a sword...." Denning L.J. expressed his view at page 770 in these words: —

"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word."

Although Viscount Simonds did not say so in *Tool Metal's case*[4] it would seem clear that he was concerned with the statement of principle for he said he did wish "to lend the authority of this House to the statement of principle which is to be found in *Combe* v. *Combe*."[7] However, he approved the statement of Bowen L.J. in *Birmingham's case.*[2] On the face of it Denning L.J.'s statement would appear to cover all promises intended to affect legal solutions and to be acted on by the promisee. No reference was made to waiver of contractual rights. Otherwise, there appears to be no difference between Denning L.J. and Bowen L.J. It is only fair to point out that Denning L.J. was also concerned with the question of promise to forbear for he had emphasised that the principle did not create new causes of action but only prevented a party from insisting on his strict legal rights.

Respondent did not dispute giving the promise or assurance to appellant but argued that it amounted merely to a concession. The learned judge preferred temporary arrangement. That the promise created no contract cannot be disputed. The promise has been pleaded and adduced in evidence. By whatever name the promise was called — concession or temporary arrangement — it was binding on respondent but terminable by respondent giving reasonable notice. The point here is that the notice given was not reasonable in the circumstances. In *Tool Metal's case*[4] the notice given was held to be reasonable as there was a lapse of some nine months. In the present case the learned judge himself considered that respondent did not give appellant reasonable time to get the supply. It was not possible in such a contract to ask appellant to revert to the original position overnight. Appellant must be given reasonable opportunity of resuming his original obligation. Although Viscount Simonds in *Tool Metal's case*[4] advised caution against supposing "particularly in commercial transactions, that mere acts of indulgence are apt to create rights" he also emphasised in no uncertain terms "that the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position." Once notice was held not to be reasonable the enforcement in full of the original obligation would be inequitable.

Despite the fact that the learned judge held against appellant on the issue of breach of contract, he awarded appellant two items of damages as prayed by appellant. The two items are (i) value of mechanical plant detained assessed at $47,508.34; and (ii) value of materials on site assessed at $138,056.06. Therefore he gave judgment in favour of appellant in "the first suit" for the sum of $185,564,40 with interest at 6% per annum until payment.

It is impossible to avoid the conclusion that the promise, call it assurance, concession or temporary arrangement, was binding on the respondent and terminable by respondent giving reasonable notice. The learned judge was of the opinion that the notice given was not reasonable in the circumstances. I cannot agree more with him. The letters from the Director-General of P.W.D. were without doubt most inadequate, in that they gave appellant insufficient time to resume his original obligations. That was also the conclusion of the learned judge when he said "It seems to me that the defendant did not give the plaintiff any reasonable time to look for his own supply." (See judgment at page 338D of Appeal Record). However, he was clearly wrong in holding that the Director-General's letters "did not constitute any valid defence to the defendant's right to determine the contract under clause 34(a) of the Conditions of Contract." Misapprehending what Viscount Simonds said in *Tool Metal's case*[4] the learned judge, for inadequate reasons given, held "that the defendant was entitled to determine the contract on April 28, 1971 in accordance with clause 34(a)(ii) of the Conditions of Contract." (See judgment at pages 346-347 of Appeal Record).

If one holds that the notice given was not reasonable in the circumstances, then one cannot logically uphold the decision of the learned judge that there was no breach on the part of respondent in "the first suit". The respondent would seem to be in breach. Hudson's *Building and Engineering Contract*, 9th Edition, page 450 states that: —

"In the more usual case where the work is partly carried out at the time when the contract is repudiated the builder will normally be entitled to the value of the work done assessed at the contract rates, plus his profit on the remaining work."

Consequently, it becomes necessary for other items of damages to be considered.

As regards "the second suit" the learned judge gave judgment in favour of respondent but had de-

ferred assessing damages against appellant until the trial of another suit (No. 70/72) where the respondent is suing Hock Hua Bank Bhd, upon a bank guarantee of $196,500. This sum is included in the damages claimed by respondent in "the second suit". Thus, if respondent succeeded against the bank the damages in "the second suit" would be reduced accordingly but if respondent failed then there would be no reduction in damages in "the second suit".

Regarding the item on shale excavation amounting to $19,411.60 this was not objected to by the respondent. Encik Saari for respondent stated that he had no objection to payments on excavation of shale. This is an admission. Therefore, appellant need not have to prove it. However, the learned judge rejected this claim. I think he was wrong to do so. At the outset of the appeal Encik Grimberg for appellant indicated that he would abandon the claims on excavation of shale and on overheads due to extension. He accepted the award made by the learned judge in respect of two items — value of mechanical plant detained and value of materials on site — amounting to $185,564.40. But, he disputed the claims in respect of four items, namely, (a) loss of profit at the lower figure of $100,000; (b) retention money of $208,721.74; (c) liquidated damages imposed by P.W.D. of $30,250 and (d) payment to sub-contractors by reason of termination of agreement $75,000. Consequently, it was submitted that the damages in "the first suit" should be varied from $185,564.40 to $516,536.14 with interest of 6% per annum with effect from April 24, 1971 until final payment.

Respondent appealed against the decision of the learned judge on the value of the materials on site. The learned judge had made a very careful assessment. He had in fact reduced considerably appellant's claim. There is no reason to disturb his assessment.

Further, respondent submitted that the special damages must be strictly proved. Appellant had made an error in calculation of the number of units. Assuming that appellant was able to complete the project the nett amount due to him was possibly over $563,698.21. Respondent had to pay Alex Tong $1.5 million being the lowest tender to complete the project. Respondent had, therefore, to spend over $900,000 more in order to complete the project. Respondent contended that the amount of $100,000 as profit was far fetched and highly speculative. In the light of the evidence it is doubtful that appellant would make any profit.

Reference was made to clause 34(c)(i) and (iv). The effect of these provisions is that if there was a breach respondent would be entitled to terminate the contract and to appoint another contractor. The total sum spent by respondent as a result of the above would have to be borne by appellant. See *Mertens* v. *Home Freeholds Co. Ltd. & Ors.*[8] Appellant conceded that if he was at fault then the property on site would become respondent's property. That would be the position if the contract was properly terminated.

Despite the miscalculation of the number of units appellant believed he could still make a small profit on the completion of the project. Apart from the assessment of the two items accepted by the appellant, the learned judge did not deal with the other items under appeal. By implication it could be said that he rejected them. But, an appellate court would like to know the reasons for the rejection in the event of an appeal. For a project of such size a miscalculation of so large a number of units would cut drastically on the profit margin. I doubt very much if he could make much profit. Before us he asked for $100,000. I think this is highly exaggerated. After hearing both sides and taking into consideration all the factors, I would assess profit at the nominal figure of $1,000. Since the contract was not properly terminated, the retention money of $200,721.74 must be refunded to appellant. As no delay could properly be attributable to any default on the part of appellant, liquidated damages of $30,250 should not be imposed against him. The payment of $75,000 to sub-contractors by the appellant followed the event of the termination of the contract. Appellant is clearly entitled to this item. The award of damages in "the first suit" is, therefore varied from $185,564.40 to $492,536.14 with interest at 6% per annum with effect from April 24, 1971 until final payment.

The result is that appellant succeeds in both the first and the second suits so that his appeal is allowed in respect of both. He is entitled to his taxed costs in the first and the second suits both in this court and in the court below. His deposit in each suit is to be returned to him. The cross-appeal by respondent against "the first suit" is dismissed with costs to appellant.

Wan Suleiman F.J. concurred.

Raja Azlan Shah F.J.: I have read the judgment in draft of Chief Justice Borneo and agree with him with the result of this appeal and wish only to add the following.

The trial judge held that the oral agreement of October 9, 1970 did not amount to a legally binding agreement to vary clause 4 of the contract but nevertheless held that it was only a temporary arrangement to supply the essential building materials. I think he is right. In my opinion, it is only a waiver or forbearance which is not contractually binding. The distinction between a forbearance and a variation is sometimes said to depend on the intention of the parties — see *Stead* v. *Dawber.*[9] It would appear that a statement is a forbearance if the party making it intends to reserve a power to retract; but it is a variation if he intends permanently to abandon his right under the contract. In the present case the respondent had clearly intended to grant only a temporary forbearance not to insist on their said contractual right with regard to the supply of waterproof plywood. That can be seen from their correspondence of March 30, 1971 and clause 6(c) of the contract. The leading case of *Hughes* v. *Metropolitan Railway Company*[1] which was decided on equitable principles enunciates that if one party leads the other "to suppose that the strict rights arising under the contract will not be enforced, or will be left in sus-

pense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to expose them where it would be inequitable having regard to the dealings which have thus taken place between the parties." *per* Lord Cairns at page 448. Thus the rule in *Hughes'* case depends on a representation of intention as distinguished from the doctrine of estoppel which is based on a representation of existing fact — see *Jorden* v. *Money.*[10] The further striking difference between the two doctrines is that the effect of the doctrine in *Hughes'* case is only to suspend rights, while estoppel operates extinctively, if at all. I do not think here it can rightly be said that the doctrine of estoppel comes into play so as to be expressly pleaded.

The equitable doctrine of forbearance to insist upon the strict rights under the contract can be repudiated by the party granting it provided that he gives reasonable notice of his intention to do so to the other party for whose benefit it was originally granted. Thus, in *Charles Rickards Ltd.* v. *Oppenhaim*[11] a contract for the sale of a car provided for delivery on March 20. The car was not delivered on that day but the buyer continued to press for delivery and finally told the seller on June 29 that he must have the car by July 25 at the latest. It was held that the buyer could not have refused peremptorily to accept the car merely because the original delivery date had done by, as he had continued to press for delivery. But he could refuse on giving the seller notice to deliver within a reasonable time. Here the notice did give the seller a reasonable time to deliver, so that the buyer was justified in refusing to take the car after July 25. Of course, events may happen which make it impossible to retract a forbearance. In *Leather Cloth Co.* v. *Hieronimus*[12] the buyer could not have retracted his agreement to shipment via Rotterdam after the goods had been lost. A buyer of goods to be shipped via Ostend agreed to shipment via Rotterdam. He was held liable for the price, though the goods were lost, as he had assented to the altered mode of performance. In this case there is no variation of the contract, but only a variation of the mode of performance; or that there is no variation, but only a waiver of forbearance.

On the facts of the present case the learned judge considered and determined that no adequate notice to the appellant to revert to his original position had been given. With that proposition I fully agree. The appellant wholly relied on the representation of the respondent that he would be supplied with essential building materials and it would be inequitable for the latter to go back on that representation unless adequate notice was given to revert to the *status quo.* What is adequate notice is a question of fact and that is essentially a matter for the trial judge.

Appeal allowed. Cross-appeal dismissed.

Solicitors: *Ee Lim & Leong.*

MURUGASU v. MICHAEL CHONG NGIAN FONG

[F.C. (Gill C.J., Ong Hock Sim and Raja Azlan Shah F.JJ.) May 27, 30, 31 and July 29, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 17 of 1976]

Contract — Oral agreement for sale of land and houses — Breach by purchaser — Agreement terminated by vendor — Subsequent purchase of land and houses by purchaser — Rent collected by vendor after purchase but before transfer — Payable to purchaser.

This was an appeal against the decision of the High Court dismissing the claim of the appellant against the respondent and giving judgment against him on the respondent's counterclaim. The appellant alleged that there had been an oral agreement for the sale of certain land and houses to the respondent. The agreement was that the purchase price should be paid by a certain date. On failure of the respondent to comply with this condition, the appellant said the deal was off. Subsequently the respondent agreed to take over the houses and the houses were transferred to him. Rents had been collected by the appellant from the tenants of the houses after the date of sale until the date of transfer. The learned trial judge held that the respondent was entitled to the rents.

Held: (1) the claim of the appellant was rightly dismissed by the learned trial judge;

(2) the learned trial judge was correct in finding that the appellant had collected the rents of the houses and that he should account for them to the respondent.

Cases referred to:-

(1) *Re Lyne* v. *Stevenson* [1921] Ch. D. 472.

(2) *In re Thackwray and Young Contract* (1889) 40 Ch. D. 34.

(3) *Shaw* v. *Foster* L.R. 5 H.L. 321, 338.

(4) *In re Lyne-Stephens and Scott Miller's Contract* [1920] 1 Ch. D. 477, 478, 480.

(5) *Davies* v. *Little-John* (1923-24) 34 C.L.R. 174.

(6) *Poh Kim Kang* v. *Ishak b. Lambik* [1971] 2 M.L.J. 251, 252.

FEDERAL COURT.

S.D.K. Peddie for the appellant.

R.R. Chelliah (*N. Ramachandran* with him) for the respondent.

Gill C.J. (Malaya): This is an appeal by the plaintiff from the decision of Wan Suleiman F.J. in the High Court at Seremban dismissing his claim against the respondent as defendant in the action and entering judgment against him on the defendant's counter-claim.

The plaintiff's claim was founded on an oral agreement, which he alleged was made on May 29, 1965, for the sale by him to the defendant of 26 houses on new sub-lots on his land previously held under Grant No. 4485 for Lot No. 517 in the town of Seremban. The events leading up to the making of the alleged oral contract are stated in the plaintiff's statement of claim as follows.

On or about April 14, 1964 the plaintiff in consideration of $1 paid to him granted to the defendant an option until 12 noon on April 20, 1964 for the sale of all but ten of the houses that he was constructing on the land in question with moneys borrowed from the Great Eastern Life Assurance Company Limited. The agreed purchase price was to be $1,310,000 of which a sum of $250,000 was to be paid upon acceptance by the option. A further sum of $450,000 was to be paid on or before July 1, 1964 and the balance of $610,000 upon construction of all the houses.